

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOHN B. ODOMS,

Petitioner,

v.

ISIDRO BACA, et al.,

Respondents.

Case No. 3:14-cv-00225-MMD-WGC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner.

The petition in the instant action challenges petitioner's state conviction. Petitioner previously challenged the same conviction in this Court, in a federal habeas petition filed under case number 2:06-cv-00368-RCJ-LRL. The petition in case number 2:06-cv-00368-RCJ-LRL was dismissed as untimely by order filed May 29, 2008. (Dkt. no. 25 in 2:06-cv-00368-RCJ-LRL.) Judgment was entered that same date. (Dkt. no. 26 in 2:06-cv-00368-RCJ-LRL.) Petitioner appealed. By order filed May 22, 2009, the United States Court of Appeals for the Ninth Circuit denied petitioner's application for a certificate of appealability. (Dkt. no. 36 in 2:06-cv-00368-RCJ-LRL.)

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Pursuant to 28 U.S.C. § 2244(b)(1), "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior petition

1 shall be dismissed.” Where a petition is dismissed with prejudice as untimely, the
2 dismissal constitutes a disposition on the merits and renders a subsequent petition
3 successive for purposes of 28 U.S.C. § 2244(b). *McNabb v. Yates*, 576 F.3d 1028,
4 1029-30 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005). The
5 prior habeas corpus petition in case number 2:06-cv-00368-RCJ-LRL was dismissed
6 with prejudice as untimely. Thus, the instant petition is a successive petition, which
7 requires petitioner to seek and obtain leave of the Ninth Circuit Court of Appeal to
8 pursue. See 28 U.S.C. § 2244(b)(3) *et seq.* Petitioner has not presented this Court with
9 proof that he has obtained leave to file a successive petition from the Ninth Circuit Court
10 of Appeals. Therefore, the instant petition will be dismissed as successive.¹

11 In order to proceed with any appeal, petitioner must receive a certificate of
12 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
13 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236
14 F.3d 550, 551-52 (9th Cir. 2001). District courts are required to rule on the certificate of
15 appealability in the order disposing of a proceeding adversely to the petitioner or
16 movant, rather than waiting for a notice of appeal and request for certificate of
17 appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255
18 Cases. Generally, a petitioner must make “a substantial showing of the denial of a
19 constitutional right” to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2);
20 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). The petitioner must demonstrate that
21 reasonable jurists would find the district court's assessment of the constitutional claims
22 debatable or wrong.” *Id.* (*quoting Slack*, 529 U.S. at 484). In order to meet this threshold
23 inquiry, the petitioner has the burden of demonstrating that the issues are debatable
24 among jurists of reason; that a court could resolve the issues differently; or that the
25 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,

26
27 ¹The Court notes that petitioner has filed three additional habeas petitions, all of
28 which were dismissed as successive petitions, including: 3:10-cv-00178-RCJ-VPC,
2:10-cv-01236-RLH-LRL, and 3:13-cv-00529-MMD-WGC.

1 no reasonable jurist would find this Court's dismissal of the petition debatable or wrong.
2 The Court therefore denies petitioner a certificate of appealability.

3 It is therefore ordered that this action is dismissed without prejudice as a
4 successive petition.

5 It is further ordered that petitioner's application to proceed *in forma pauperis* (dkt.
6 no. 1) is denied.

7 It is further ordered that petitioner is denied a certificate of appealability.

8 It is further ordered that the Clerk shall enter judgment accordingly.

9 DATED THIS 23rd day of October 2014.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE